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No. 93-1578

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE DIOCESE OF COLORADO, A COLORADO CORPORATION, AND BISHOP WILLIAM FREY,

Petitioners,

v.

MARY E. MOSES n/k/a MARY ELAINE TENANTRY,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF IN SUPPORT OF PETITION FOR CERTIORARI TO THE SUPREME COURT OF COLORADO ON BEHALF OF THE COLORADO CATHOLIC CONFERENCE, THE COLORADO COUNCIL OF CHURCHES, THE COLORADO SPRINGS ASSOCIATION OF EVANGELICALS, THE ROCKY MOUNTAIN PRESBYTERY OF THE PRESBYTERIAN CHURCH IN AMERICA, AND THE ROCKY MOUNTAIN LEGAL FOUNDATION, INC.

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Respondent.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Amici respectfully request leave to file the attached brief in support of the petition for a writ of certiorari to the Colorado Supreme Court as allowed under Rule 37 of the rules of this Court.[1]

1. This motion is submitted by a coalition of Colorado churches and religious organizations which ministers to over one million Coloradans, and by the Rocky Mountain Family Legal Foundation, Inc.

The coalition of Colorado churches and religious organizations include the Colorado Catholic Conference, the Colorado Council of Churches, the Colorado Springs Association of Evangelicals, and the Rocky Mountain Presbytery of the Presbyterian Church in America (collectively, the "Churches of Colorado").

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[1] The petitioners have consented to the filing of this brief. The respondent has not.

The Colorado Catholic Conference is the united voice of the three Roman Catholic dioceses of Colorado: the Archdiocese of Denver, the Diocese of Pueblo, and the Diocese of Colorado Springs. It represents 303 parishes and missions, 485,555 Catholics, and 14,000 students in fifty-one schools.

The Colorado Council of Churches consists of thirteen Christian churches, including the African Methodist Episcopal Churches of Colorado, the American Baptist Churches of the Rocky Mountains, the Christian Church (Disciples of Christ) of the Central Rocky Mountain Region, the Christian Methodist Episcopal Churches of Colorado, the Church of the Brethren Western Plains District, the Episcopal Church Diocese of Colorado, the Evangelical Church in the America Rocky Mountain Synod, the National Baptist Convention U.S.A. Western States Convention, the Greek Orthodox Diocese of Denver, the Presbyterian Church USA including the Presbyteries of Boulder, Denver, Pueblo, and Western Colorado, the Roman Catholic Archdiocese of Denver, the United Church of Christ Rocky Mountain Conference, and the United Methodist Church Rocky Mountain Conference. The Colorado Council of Churches represents approximately 850,000 Christians in every region of Colorado.

The Colorado Springs Association of Evangelicals is an affiliate of the National Association of Evangelicals. It is comprised of pastors and religious leaders from approximately fifty churches and fifteen para-church organizations with a combined following of nearly 15,000 individuals.

The Rocky Mountain Presbytery of the Presbyterian Church in America consists of eleven Colorado and Wyoming congregations with 4,000 individual members.

The Rocky Mountain Family Legal Foundation, Inc. is a non-profit religious freedom advocacy group serving individuals and churches throughout Colorado.

2. The issues presented by the decision of the Colorado Supreme Court involve fundamental questions regarding the boundaries between church and state—specifically:

a. Whether the courts may prescribe the content of pastoral counseling speech,

b. Whether the courts may proscribe the administration of sacramental confession in certain circumstances,

c. Whether the courts may dictate the identity of ministers selected or retained by a church,

d. Whether the courts may define ecclesial agency relationships contrary to the doctrine and canons of the church, and

e. Whether the courts may prescribe the character of church supervision of ministers.

3. *Amici* have a direct stake in this proceeding because the decision below unlawfully restricts pastoral speech and regulates matters exclusively of ecclesiastical cognizance.

4. *Amici* support the petition for certiorari and its request for consideration of the applicability of the Religious Freedom Restoration Act. They also contend that this Court should consider the right of church autonomy, the significance of the constitutional bar to clergy malpractice claims, and the limited scope of the neutral principles of law approach.

5. *Amici* are inadequately represented by any other party with regard to these issues.

WHEREFORE, *amici* respectfully request leave to file this brief.

Respectfully submitted,

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MARY E. MOSES n/k/a MARY ELAINE TENANTRY,

Respondent.

BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS' APPLICATION FOR CERTIORARI AND IN SUPPORT OF REVERSING THE DECISION OF THE SUPREME COURT OF COLORADO

INTERESTS OF *AMICI*

The interests of the *amici* are detailed in the motion accompanying this brief.

Notwithstanding the theological, social, and political differences between them, these *amici* organizations stand together to ask this Court to grant a writ of certiorari and reverse the Colorado Supreme Court.

SUMMARY OF ARGUMENT

The Colorado Supreme Court has taken control of the Episcopal Diocese of Colorado and its bishop by applying its secular principles to:

Dictate the content of pastoral counseling speech,

Proscribe the administration of sacramental confession,

Dictate the identity of ministers selected or retained by a church,

Define ecclesial agency relationships contrary to the doctrine and canons of a church, and

Prescribe the character of church supervision of ministers.

This unprecedented judicial usurpation of ecclesial authority not only reshapes church doctrines, it also manages pastoral utterances and rules church-clergy relationships. This decision attempts to remake the church in the image of the court's secular biases. It will inevitably diminish the availability of pastoral counseling to those in greatest need and encourage ongoing judicial entanglement in ecclesiastical affairs.

The Colorado Supreme Court's recognition of claims of negligent management by a bishop of his priest and of a bishop's breach of fiduciary duty for hearing a parishioner's confession and for failing to tell her that she had no fault are, essentially, recognition of claims of clergy or episcopal malpractice which have been rejected by the California Supreme Court, the Utah Court of Appeals, the United States District Court for the Southern District of New York, and even the Colorado Supreme Court.

The *Moses* court's management of clergy-church relationships is contrary to the many decisions of this Court and the U.S. Courts of Appeals which recognize a right of church autonomy that, absent fraud or collusion, courts may not invade. *Moses* also ignores the boundaries established by this Court in the application of the neutral principles of law approach.

ARGUMENT

The Colorado Supreme Court has assumed ecclesiastical competence and authority over the Episcopal Diocese of Colorado and its bishop. It has granted the bishop and his diocese both more and less authority over the hiring and ordination of priests than that provided under denominational doctrine. It has microscopically prescribed the lawful content of pastoral counseling. These unprecedented judicial usurpations of ecclesiastical authority violate not only the Religious Freedom Restoration Act but also the right of church autonomy arising from the Religion Clauses of the First Amendment.

By affirming a $1.2 million verdict, the court below purports to grant the petitioners more authority than they have under the Episcopal doctrine of congregational calling by making them employers of a priest who is not their employee. *Moses v. Diocese of Colorado,* 863 P.2d 310, 331-37 (Colo. 1993) (Rovira, C.J., dissenting). Bishop Frey testified that because Episcopal parishes were in America for almost 200 years before their bishops arrived, Episcopal bishops have "titular authority, sort of a ceremonial authority, but very little real authority or power." Tr. at 64. He testified that Father Robinson, the alleged perpetrator of counseling misconduct, was an employee of a separately incorporated parish and not of the Diocese. Tr. at 62. He testified that he, as bishop, had no authority to hire or fire parish priests, tr. at 63 and 64, or even to veto their engagement by a parish. Tr. at 68-69. Father Robinson was, moreover, only an associate pastor who under Canon 14(a) of the Episcopal Church was "selected by . . . and under the authority and direction of the [parish] Rector." *Moses,* 863 P.2d at 332 (1993) (Rovira, C.J., dissenting). Episcopal ecclesiology empowers congregations, not bishops, to call ministers. *Articles of Religion,* art. XXIII in *The Book of Common Prayer* at 872 (1979). The Colorado Supreme Court has reversed this rule.

The court below purports to grant petitioners less authority than their doctrine provides by finding it unlawful for the bishop to ordain a priest who has any history of "sexual identification ambiguity," "depression," or "low self-esteem." *Moses,* 863 P.2d

at 328. The first condition, presumably a tendency toward homosexuality, *but see id.* at n.23, should, it would seem, render a counselor of women more safe, rather than vice versa. A history of some depression and low self-esteem, if applied as a disqualifier, would deplete the ranks of all counselors and depreciate Christian notions of forgiveness and redemption.[1] In addition, the court below overlooked Bishop Frey's testimony that the church psychologist had given Father Robinson the highest approval rating for ministry. Tr. at 98. No court should supplant theological criteria for ordination with its own.

In the Anglican tradition of which the Episcopal Church is a part, the roles and duties of bishop and priest are largely defined by rituals prescribed by *The Book of Common Prayer.* During the ordination rite, a bishop does not inquire as to a candidate's possible depression and low self-esteem, but as to whether the candidate has "been selected in accordance with the canons of this Church?" and whether the candidate's "manner of life [is] suitable to the exercise of this ministry?" *The Book of Common Prayer* at 526. A candidate neither can nor does promise psychological perfection. He vows, rather, loyalty to Church doctrine, discipline, and worship.

> [He] declare[s] that [he does] believe the Holy Scriptures of the Old and New Testaments to be the Word of God, and to contain all things necessary to salvation; and [that he will] engage to conform to the doctrine, discipline, and worship of The Episcopal Church.

Id. In keeping with the theology of congregational election, the bishop then asks the congregation whether it desires the bishop to ordain the candidate. *Id.* at 527.

The court below also attempts to prescribe the precise content of pastoral counseling by finding that Bishop Frey breached

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[1] Such criteria, applied in earlier times, would have disqualified Moses from leading the exodus, Exodus 4:10-13 (low self-esteem), Saul from serving as King of Israel, I Samuel 19:9 (depression), and Elijah from serving as prophet. I Kings 19:4 (suicidal).

his fiduciary duty which purportedly arose from his sole encounter with Ms. Moses. When Ms. Moses reported that she was the victim of pastoral counseling misconduct by a priest, Bishop Frey saw that she was burdened by inordinate guilt. When she requested sacramental confession, Bishop Frey complied. Tr. at 117-22. The court below found confession unlawful in this context. It apparently held that, by absolving Ms. Moses, Bishop Frey failed to help her understand "that she was not the only person responsible for" the inappropriate relationship with her priest. *Moses,* 863 P.2d at 323. The court also faulted Bishop Frey for failing to recommend secular counseling and for suggesting that Ms. Moses should treat the matter confidentially. *Id.* These rulings, whether taken separately or as a whole, are highly entangling. They violate church autonomy.

I. THIS CASE IS WORTHY OF THE COURT'S CONSIDERATION BECAUSE IT ALLOWS COURTS TO SELECT MINISTERS, TO DEFINE RELATIONSHIPS BETWEEN DIOCESE, PARISH, AND PRIEST, AND TO SHAPE THE THEOLOGY OF A BISHOP'S SHEPHERDING DUTY TO HIS PARISHIONER AND HIS PRIEST. IT THEREBY DISCOURAGES MINISTRY TO THOSE IN NEED, VIOLATES CHURCH AUTONOMY, AND FORMS RELIGION AS IT WILL EXIST IN THE FUTURE.

The history of the Christian Church has involved hundreds of theological disputes framed by ministerial antagonists. The Church's choice between antagonists is often a choice of one theology over another. When the Church sided with Paul over James, it welcomed Gentiles into the fold. When it sided with Athanasius over Arius, it recognized the Trinity of God. When it found for Augustine over the Donatists, it enshrined forgiveness. When the Church of England chose Cranmer over Wolsey, it chose a course independent of and often theologically distinct from Rome. The right of church autonomy means that, absent fraud or collusion, the state cannot dictate such choices. *Watson v. Jones,* 80 U.S. (13 Wall.) 679 (1871). *See* paragraph II(B) *infra.*

Just as the state cannot dictate the identity of the preacher, it cannot dictate the content of pastoral speech. When Bishop Frey chose to absolve a woman requesting confession, he chose to act upon his church's belief that confession is the remedy for guilt even when the penitent is not as guilty as she may think. Tr. at 118. This decision was informed by a theology over which the Colorado Supreme Court should claim no competence.

It is also important for this Court to reverse *Moses* because it profoundly chills churches' willingness to minister, listen to, and counsel those who are the most broken and the most vulnerable. Ms. Moses had a history of injury which long preceded her encounter with Father Robinson.[2] She and individuals like her are those in greatest need of counseling. Pastoral counselors gratuitously enhance the mental and spiritual health for millions of Americans. After *Moses,* pastoral counselors will be less inclined to counsel those parishioners with the greatest need or even hear their confessions because of the unavoidable legal risks. Judicially regulating the content of this counseling and imposing a duty to refer the parishioner to secular counselors will "stifle" such assistance. *Nally v. Grace Community Church of the Valley,* 47 Cal. 3d 278, 763 P.2d 948, 969 (1988).

Moses likewise discourages church leaders from meeting with alleged victims of misconduct because such meetings risk imposing a civil fiduciary duty that is stripped of any constitutional protection.

Moses will also spawn more claims asking civil courts to supervise church-minister relationships. This will inevitably lead to "considerable ongoing government entanglement in religious affairs" which this Court has condemned. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day*

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[2] Ms. Moses and her sister "were sexually abused by their father when they were children[, and] developed a multiple personality disorder as protection against" that abuse. Before she "entered grade school, she had developed several separate identities." Before she ever met Father Robinson, she was hospitalized for her mental illness; she attempted suicide; and the state supervised her visits with her own children. *Moses,* 863 P.2d at 315.

Saints v. Amos, 483 U.S. 327, 343 (1987) (Brennan, J., concurring). This entanglement, reinforced by verdicts like the one here, will result in a state-imposed theology and ecclesiology. "When the state interferes with the autonomy of a church, and particularly when it interferes with the allocation of authority and influence within a church, it interferes with the very process of forming the religion as it will exist in the future." D. Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy,* 81 Colum. L. Rev. 1373, 1391 (1981).

II. THE *MOSES* HOLDING CONFLICTS WITH THE DECISIONS OF THIS COURT, U.S. COURTS OF APPEALS, STATE COURTS OF LAST RESORT, AND THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993.

A. The Claims Of Breach Of Fiduciary Duty, Negligent Hiring, And Negligent Supervision, As Applied Here, Are Analytically Indistinguishable From The Claim Of Clergy Malpractice Which Courts Everywhere Have Rejected.

The Episcopal Church teaches that its bishops are pastoral shepherds of parishioners and priests. During ordination, an Episcopal bishop vows "to be in all things a faithful pastor and wholesome example for the entire flock of Christ." *The Book of Common Prayer* at 517. For Episcopalians, a bishop is an icon of Christ, "the Shepherd and Bishop of our souls." *Id.* at 518. The new bishop covenants, as "chief priest and pastor[, to] encourage and support all baptized people in their gifts and ministries [and to] nourish them from the riches of God's grace." *Id.* The bishop ministers to all the faithful, including the priests of his diocese. During ordination, a bishop promises to "sustain [his] fellow presbyters and take counsel with them." *Id.* The new bishop is consecrated to "feed and tend the flock of Christ." *Id.* at 521. The symbol of his office is the shepherd's staff.

Thus, when an Episcopal bishop sees a parishioner with issues and needs like those of Ms. Moses or when he ordains,

counsels, or disciplines a priest, he does so in his role as pastor or shepherd of his people. His decisions, actions, and statements in these contexts, whether denominated by the civil courts as clergy malpractice, breach of fiduciary duty, or negligent hiring, supervision, or retention,[3] are the professional decisions, actions, and statements of a pastor shepherding his flock. Every court that has considered the constitutionality of a clergy malpractice claim has found the claim barred by the Religion Clauses of the First Amendment.[4] *Nally,* 47 Cal.3d 278, 763 P.2d 948 (Cal. 1988); *Destefano v. Grabrian,* 763 P.2d 275 (Colo. 1988); *see White v. Blackburn,* 787 P.2d 1315 (Utah Ct. App. 1990); *Schmidt v. Bishop,* 779 F. Supp. 321, 324, 327-28 (S.D.N.Y. 1991) (judicial definition of a standard of care for a clergyman unconstitutionally entangles the state with religion).

B. The *Moses* Court's Willingness To Supervise The Church-Minister Relationship Is Contrary To The Many Church Autonomy Decisions Of This Court And The U.S. Courts Of Appeals.

The Colorado Supreme Court's willingness to find negligent ordination based upon a report of depression and low self-esteem is contrary to the right of church autonomy which, absent fraud or collusion, bars judicial supervision of church-minister relationships. This right has been repeatedly recognized in the intra-church property and clergy selection disputes, *Watson v.*

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[3] However denominated, the claims of pastoral counseling malpractice, clergy malpractice, breach of fiduciary duty, and negligent hiring, supervision, or management require courts to deeply entangle themselves in theological and ecclesiological affairs by defining how a reasonable minister or bishop or pastoral counselor should minister. "[I]n analyzing and defining the scope of a fiduciary duty owed persons by their clergy, the Court would be confronted by the same constitutional difficulties encountered in articulating the generalized standard of care for a clergyman required by the law of negligence." *Schmidt v. Bishop,* 779 F. Supp. 321, 326 (S.D.N.Y. 1991).

[4] *See also* cases which reject claims of clergy malpractice on non-constitutional grounds. *Handley v. Richards,* 518 So.2d 682 (Ala. 1987); *Strock v. Pressnell,* 38 Ohio St.3d 207, 527 N.E.2d 1235 (Ohio 1988) (claim barred by heart balm statute); *Byrd v. Faber,* 565 N.E.2d 584 (Ohio 1991).

Jones, 80 U.S. (13 Wall.) 679 (1871); *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America,* 344 U.S. 94 (1952); *Kreshik v. St. Nicholas Cathedral of the Russian Orthodox Church of North America,* 363 U.S. 190 (1960); *Presbyterian Church of the United States v. Hull Memorial Presbyterian Church,* 393 U.S. 440 (1969); *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich,* 426 U.S. 696 (1976); *Jones v. Wolf,* 443 U.S. 595 (1979); in a testamentary chaplaincy dispute, *Gonzales v. Roman Catholic Archbishop of Manila,* 280 U.S. 1 (1929), in various civil rights disputes, *McClure v. The Salvation Army,* 460 F.2d 553 (5th Cir. 1972) *cert. denied* 409 U.S. 896 (1972) (Title VII); *Minker v. Baltimore Annual Conf. of the United Methodist Church,* 894 F.2d 1354 (D.C. Cir. 1990) (Age Discrimination in Employment Act); in National Labor Relations Act claims, *National Labor Relations Bd. v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979); in wrongful discharge controversies, *Natal v. Christian and Missionary Alliance,* 878 F.2d 1575 (1st Cir. 1989); in disagreements regarding canonical due process, *Kaufmann v. Sheehan,* 707 F.2d 355 (8th Cir. 1983); and in termination disputes attendant with claims of defamation, intentional infliction of emotional distress, and breach of contract. *Hutchison v. Thomas,* 789 F.2d 392 (6th Cir. 1986) *cert. denied* 479 U.S. 885 (1986).

These decisions and their many progeny constitute a river of precedent recognizing the freedom and autonomy of the church from entanglement by the state. This river runs wide and deep, but it nowhere runs wider or deeper than when the defendant church is hierarchical and the plaintiff is asking the state to supervise the church's relationship with its own clergy. Absent a showing of fraud or collusion, the First Amendment does not allow it.

C. The *Moses* Court's Application Of The "Neutral Principles Of Law" Approach Far Exceeds The Defined Limits Of That Approach.

The court below holds that it can determine whether the content of a bishop's counsel constitutes a breach of fiduciary duty and whether a bishop's ordination and supervision of his priest is negligent by resorting solely to neutral principles of law.

No court has ever extended the neutral principles approach so far. This Court limited the neutral principles approach to instances in which a court can rely "exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges." *Jones v. Wolf,* 443 U.S. 595, 603 (1979). This Court also forbids application of the neutral principles approach to determine the locus of control within a church which, for the Diocese of Colorado, was so cavalierly reshaped by the Colorado Supreme Court. *Id.* at 605. *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.,* 396 U.S. 367, 369-70 (1970) (Brennan, J., concurring). In addition, Maryland's highest court rejects any application of the neutral principles approach which would, as here, be tantamount to judicial selection of clergy. *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.,* 254 A.2d 162, 170 (Md. 1969).

> We do not understand that the decision in *Hull* requires the State equity courts to provide effective discipline and control of a denomination over its clergy or to maintain that denomination's "purity of doctrine." As we see it, this would be "establishment of religion" with a vengeance, and under . . . the prohibitions of the First Amendment [we are not] permitted to do this.

Id.

D. Judicial Supervision Of Pastoral Speech Through Imposition Of A Fiduciary Duty Is Barred By The Free Exercise Clause.

The willingness of the court below to dictate the content of pastoral counseling is contrary to other precedents. *Nally,* 47 Cal.3d 278, 253 Cal. Rptr. 97, 763 P.2d 948 (Cal. 1988); *Guinn v. Church of Christ of Collinsville,* 775 P.2d 766, 774 (Okla. 1989). *See* pp. 4-5, *supra.*

E. If This Court Holds That The Religious Freedom Restoration Act Of 1993 Controls The Analysis Below, Then The State Has No Compelling Interest For So Severely Restricting Religious Liberty.

Legal issues arising from church-minister relationships are properly analyzed under the church autonomy cases discussed above. Thus, the *Moses* court's reliance on *Employment Div., Dept. of Human Resources v. Smith,* 494 U.S. 872 (1990) is misplaced. If, however, this Court finds that *Smith's* restriction of the compelling state interest test is a proper foundation for *Moses,* then these *amici* concur that the case should be remanded for further evidence regarding issues relevant to the application of the Religious Freedom Restoration Act of 1993. Any such remand should also allow further evidence regarding the right of church autonomy.

CONCLUSION

The Churches of Colorado and the Rocky Mountain Family Legal Foundation request that this Court issue a writ of certiorari and reverse the decision below.

Respectfully submitted,

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April 30, 1994